[1994] 3 MLJ 16 SEPTEMBER 1994 Reports 117–184

Tan Sung Mooi v Too Miew Kim

SUPREME COURT (KUALA LUMPUR) — APPEAL NO 3 OF 1993
ABDUL HAMID OMAR LP, GUNN CHIT TUAN CJ (MALAYA), EDGAR JOSEPH JR, EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
1 AUGUST 1994

Family Law *— Divorce — Application for ancillary reliefs after grant of decree nisi — Both parties were non-Muslims when they married under Chinese customary rights — Conversion to Islam by one party after divorce but before application for ancillary reliefs — Whether High Court had jurisdiction to hear application — Law Reform (Marriage and Divorce) Act 1976 ss 3 & 51*

Civil Procedure *— Jurisdiction — Divorce — Application for ancillary reliefs — Conversion to Islam by one party after divorce but before application for ancillary reliefs — Whether High Court had jurisdiction to hear application — Whether s 3 of the Law Reform (Marriage and Divorce) Act 1976 unconstitutional in light of arts 11(1) & 121(1A) of the Federal Constitution — Federal Constitution arts 11(1) & 121(1A) — Selangor Administration of Muslim Law Enactment 1952 s 45(3) — Law Reform (Marriage and Divorce) Act 1976 ss 3 & 51*

Statutory Interpretation *— Construction of statutes — Legislative intent — Law Reform (Marriage and Divorce) Act 1976 s 3*

The petitioner and respondent were married in 1967 under Chinese customary rights and cohabited until 1982 when they decided to live apart. In 1988, the petitioner left the matrimonial home and in 1989, filed a divorce petition under s 53 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). In 1991, the High Court granted a decree nisi to be made absolute after three months. Pending that, the petitioner filed an application against the respondent under ss 76 and 77 of the Act for an order of division of matrimonial assets and for maintenance.

The respondent raised the issue that the High Court had no jurisdiction over him with respect to the ancillary relief arising from the divorce because of his conversion to Islam. The petitioner, on the other hand, contended that since she remained a non-Muslim, she could not come under the jurisdiction of the Syariah Court. Hence, the High Court should continue to exercise its jurisdiction in the matter. In this regard, she contended that s 3(3) of the Act was unconstitutional in so far as it prevented the High Court from granting her the order for ancillary reliefs, as she would effectively have no remedy in law against the respondent. Arising from the above issues, the judicial commissioner referred the following questions for the opinion of the Supreme Court:

(1) Is s 3 of the Act unconstitutional in the light of arts 11(1) and 121(1A) of the Federal Constitution?

(2) Is the High Court entitled to exercise its continuing jurisdiction to grant ancillary relief, in view of the fact that the High Court had dissolved the marriage?

Held, remitting the case to the High Court for final disposal of the ancillary application:

(1) In the present reference, it is common ground that both parties were non-Muslims who contracted a non-Muslim marriage. It follows that as the petitioner's application under ss 76 and 77 concerned matters affecting both parties' legal obligations as non-Muslims and incidental to the granting of the divorce, the High Court would have jurisdiction to hear and determine the ancillary proceedings despite the fact that the respondent had converted to Islam after the divorce but before the hearing of the ancillary application.

(2) From the wording of s 51(2) of the Act, the legislature clearly intended to provide ancillary reliefs for non-Muslim spouses and the children of the marriage as a result of one party's conversion to Islam. Therefore, by implication, the High Court, in the present reference, has jurisdiction to hear and determine the ancillary issues. It would result in grave injustice to non-Muslim spouses and children whose only remedy would be in the civil courts if the High Court no longer has jurisdiction, since the Syariah Courts do not have jurisdiction over non-Muslims. In the context of the legislative intent of s 3 and the overall purpose of the Act, the respondent's legal obligations under a non-Muslim marriage could not surely be extinguished or avoided by his conversion to Islam.

(3) Section 3 of the Act is therefore not unconstitutional. In so far as the Act shall not apply to Muslims, this is consistent with art 11(1) of the Federal Constitution which provides that every person has the right to profess and practise his religion. Although the new cl 1A of art 121 has taken away the jurisdiction of the High Court in respect of matters falling within the jurisdiction of the Syariah Court, the Syariah Court does not have jurisdiction over the petitioner who is a non-Muslim. Therefore, art 121(1A) of the Federal Constitution does not affect the jurisdiction of the High Court to hear the application under ss 76 and 77 of the Act.

Per curiam:
It is the task of the judiciary to interpret an Act according to the intent of them that made it.

[Bahasa Malaysia summary

Pempetisyen and responden telah berkahwin pada tahun 1967 mengikut adat orang Cina dan telah tinggal bersama sehingga tahun 1982 apabila mereka membuat keputusan untuk tinggal berasingan. Pada tahun 1988, pempetisyen telah meninggalkan kediaman suami isteri dan dalam tahun 1989, telah memfailkan suatu petisyen perceraian di bawah s 53 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu'). Pada tahun 1991, Mahkamah Tinggi telah memberi suatu dekri nisi yang akan dijadikan mutlak dalam tempoh tiga bulan. Sebelum itu, pempetisyen telah memfailkan suatu permohonan terhadap responden di bawah ss 76 dan 77 Akta itu untuk suatu perintah pembahagian aset perkahwinan dan untuk nafkah.

Responden telah membangkitkan isu bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa terhadapnya berkaitan dengan relief sampingan yang wujud akibat perceraian itu kerana beliau telah memeluk agama Islam. Sebaliknya, pempetisyen telah berhujah bahawa oleh kerana beliau bukan seorang Islam, beliau tidak berada di bawah bidang kuasa Mahkamah Syariah. Oleh itu, Mahkamah Tinggi sepatutnya terus menggunakan bidang kuasanya di dalam hal itu. Oleh itu, beliau telah berhujah bahawa s 3(3) Akta itu adalah tidak mengikut perlembagaan dalam erti kata bahawa ianya menghalang Mahkamah Tinggi daripada memberinya perintah untuk relief sampingan, kerana beliau tidak akan mempunyai sebarang remedi di sisi undang-undang terhadap responden. Akibat isu tersebut, pesuruhjaya kehakiman telah merujuk soalan-soalan berikut kepada Mahkamah Agung untuk pendapatnya:

(1) Adakah s 3 Akta itu tidak mengikut perlembagaan memandangkan perkara 11(1) dan 121(1A) Perlembagaan Persekutuan?

(2) Adakah Mahkamah Tinggi berhak menggunakan bidang kuasanya yang berterusan untuk memberi relief sampingan, memandangkan bahawa Mahkamah Tinggi telah membubarkan perkahwinan itu?

Diputuskan, meremit kes ini ke Mahkamah Tinggi untuk penyelesaian muktamad permohonan sampingan itu:

(1) Di dalam rujukan ini, adalah menjadi titik persamaan bahawa kedua-dua pihak tidak merupakan penganut Islam dan telah mengikat perkahwinan bukan Islam. Dengan itu, oleh kerana permohonan pempetisyen di bawah ss 76 dan 77 adalah berkaitan dengan perkara yang melibatkan obligasi undang-undang kedua-dua pihak yang bukan beragama Islam dan berkaitan dengan perintah perceraian itu, Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar dan memutuskan prosiding sampingan walaupun responden telah memeluk agama Islam selepas perceraian itu tetapi sebelum pendengaran permohonan sampingan itu.

(2) Dari perkataan s 51(2) Akta itu, badan perundangan dengan jelas bermaksud untuk memberi relief sampingan kepada pasangan dan kanak-kanak yang bukan beragama Islam jika sebelah pihak memeluk agama Islam. Oleh itu, melalui implikasi, Mahkamah Tinggi, di dalam rujukan ini, mempunyai bidang kuasa untuk mendengar dan memutuskan isu sampingan. Ketidakadilan yang serius akan diakibatkan kepada pasangan dan kanak-kanak yang tidak beragama Islam, kerana remedi tunggal mereka adalah di dalam mahkamah sivil, jika Mahkamah Tinggi tidak lagi mempunyai bidang kuasa, kerana Mahkamah Syariah tidak mempunyai bidang kuasa terhadap orang yang tidak menganut agama Islam. Dalam konteks niat perundangan mengenai s 3 dan tujuan keseluruhan Akta itu, obligasi undang-undang responden di bawah suatu perkahwinan di antara pihak yang bukan beragama Islam tidak boleh sememangnya dilunaskan atau diketepikan kerana beliau telah menganut agama Islam.

(3) Oleh itu, s 3 Akta itu bukanlah tidak mengikut perlembagaan. Setakat mana Akta itu tidak terpakai kepada orang Islam, ini adalah konsisten dengan perkara 11(1) Perlembagaan Persekutuan yang memperuntukkan bahawa setiap orang mempunyai hak untuk menganut dan mengamal agamanya sendiri. Walaupun fasal baru 1A perkara 121 telah menghilangkan bidang kuasa Mahkamah Tinggi di dalam perkara yang jatuh di bawah bidang kuasa Mahkamah Syariah, Mahkamah Syariah tidak mempunyai bidang kuasa terhadap pempetisyen yang tidak merupakan seorang Islam. Oleh itu, perkara 121(1A) Perlembagaan Persekutuan tidak menjejaskan bidang kuasa Mahkamah Tinggi untuk mendengar permohonan di bawah ss 76 dan 77 Akta itu.

Per curiam:
Adalah menjadi tugas badan kehakiman untuk mentafsirkan sesuatu Akta menurut niat mereka yang telah menggubal Akta itu.]

Notes

For a case on the application for ancillary relief in a divorce, see [1991] Mallal's Digest 1167.

For cases on the court's jurisdiction in relation to Muslim Law, see 2 *Mallal's Digest* (4th Ed) para 1473; [1992] Mallal's Digest 292–295.

For cases on the construction of statutes, see 11 *Mallal's Digest* (4th Ed) para 1308–1368; [1989] Mallal's Digest 1473–1474; [1990] Mallal's Digest 1159–1160; [1991] Mallal's Digest 1908–1910; [1992] Mallal's Digest 1614–1624.

Cases referred to

Coke 4 Inst 330 (refd)

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)

Letchumy v Ramadason [1984] 1 MLJ 143 (overd)
Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (refd)
Nothman v Barnet London Borough Council [1978] 1 All ER 1243; [1978] 1 WLR 220 (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993
Courts of Judicature Act 1964 ss 24(a), 48
Federal Constitution arts 11(1), 121(1A)
Law Reform (Marriage and Divorce) Act 1976 ss 3, 48, 51, 53, 76, 77
Married Women and Children (Maintenance) Act 1950 s 9
Selangor Administration of Muslim Law Enactment 1952 s 45(3)

Appeal from: Divorce Petition No S6–33–758–1989 (High Court, Kuala Lumpur)

Balwant Singh Sidhu (*Balwant Singh Sidhu & Co*) for the appellant.
Pawancheek bin Marican (*Syarikat Sivam*) for the respondent.

Mohamed Dzaiddin SCJ (delivering the grounds of judgment of the court): This was a reference in the form of a special case from the High Court Kuala Lumpur made under s 48 of the Courts of Judicature Act 1964.

Both the petitioner and the respondent, who are Malaysian-born Chinese, were married according to Chinese customary rites on 20 February 1967 and cohabited in Malaysia until April 1982, when they decided to live apart. Some time in March 1988, the petitioner left the matrimonial home. On 22 November 1989, the petitioner filed a divorce petition under s 53 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') on the ground that her marriage with the respondent had irretrievably broken down. On 17 December 1991, the Kuala Lumpur High Court dissolved the marriage and granted a decree nisi to be made absolute after three months. In the meanwhile, pending the decree nisi being made absolute, the petitioner, on 24 December 1991, filed an application against the respondent under ss 76 and 77 of the Act for an order of division of matrimonial assets and for maintenance. The respondent opposed the petitioner's application on several grounds, but in a subsequent affidavit, he raised the issue that the High Court had no jurisdiction over him with respect to the ancillary relief arising from the divorce because of his conversion to Islam. In fact, on the direction of the court, he affirmed an affidavit on 15 April 1993, deposing that he embraced Islam on 9 January 1993 at Jabatan Agama Islam, Wilayah Persekutuan, and had taken the name of Abdul Halim Too bin Abdullah.

On 24 May 1993, the learned judicial commissioner heard an application for reference to the Supreme Court under s 48 of the Courts

of Judicature Act 1964. The respondent contended that being a Muslim, the High Court no longer had jurisdiction over him in view of s 3(3) of the Act and that only the Syariah Court had jurisdiction in respect of matters ancillary to the divorce. The petitioner, on the other hand, contended that since she remained a non-Muslim, she could not come under the jurisdiction of the Syariah Court. Hence, the High Court should continue to exercise its jurisdiction in the matter. In this regard, she contended that s 3(3) was unconstitutional in so far as it prevented the High Court from granting her the order for ancillary reliefs, as she would effectively have no remedy in law against the respondent. Arising from the above issues, the judicial commissioner referred the following questions for our opinion:

(1) Is s 3 of the Act unconstitutional, in the light of arts 11(1) and 121(1A) of the Federal Constitution?

(2) Is the High Court entitled to exercise its continuing jurisdiction to grant ancillary relief, in view of the fact that the High Court had dissolved the marriage?

After hearing counsel, we answered the above question (1) in the negative and question (2) in the affirmative. On question (2), based on the facts in this reference, we confirmed that the High Court has jurisdiction to hear the petitioner's application for ancillary reliefs under the Act, notwithstanding the respondent's conversion to Islam after the divorce.

We shall deal first with question (2). In practical terms, we are asked to decide, in view of s 3(3) of the Act, whether the High Court has jurisdiction to continue to hear the petitioner's application for ancillary reliefs under ss 76 and 77 of the Act against the respondent, who converted to Islam after the dissolution of their non-Muslim marriage.

There are two main reasons why we form the opinion that, on the facts of the reference, the High Court has jurisdiction to continue to hear the application.

Section 3 of the Act states as follows:

(1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.

(2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.

(3) *This Act shall not apply to a Muslim* or to any person who is married under Muslim law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.

(4) ... (Emphasis added.)

The purpose for which the Act was enacted is set out in the title which is:

> An Act to provide for monogamous marriages and the solemnisation and registration of such marriages; to amend and consolidate the law relating to divorce and to provide for matters incidental thereto.

Parts III and IV of the Act deal with marriages and solemnization and registration of marriages. It should be noted that s 48 stipulates that nothing in the Act shall authorize the court to make a decree of divorce except where the marriage has been registered or deemed to be registered under the Act or where the marriage between the parties was contracted under a law providing for monogamous marriage. This section seems to fortify the legislative purpose as set out in the title of the Act. Next, we have Pt VI, comprising, inter alia, ss 51 and 53, which deal with divorce.

The legislative intention of s 3 must be construed within the framework and the general purpose of the Act. With that in mind, the legislature by enacting s 3 clearly intended to specify the persons to whom the Act applies or does not apply. Thus, by s 3(1), except as otherwise expressly provided, the Act applies to all persons in Malaysia and those domiciled in Malaysia. Section 3(3) provides that the Act shall not apply to Muslims or Muslim marriages and that only non-Muslim marriages may be solemnized or registered. This clearly means that the Act only applies to non-Muslims and non-Muslim marriages. In the present reference, it is common ground that both parties were non-Muslims who contracted a non-Muslim marriage. The High Court dissolved the said marriage and thereafter the petitioner filed an ancillary application under ss 76 and 77 of the Act. From the above facts, it is without doubt that the Act applies to them since they were non-Muslims. It follows that as the petitioner's application under ss 76 and 77 concerned matters affecting both parties' legal obligations as non-Muslims and incidental to the granting of the divorce, the High Court would have jurisdiction to hear and determine the ancillary proceedings despite the fact that the respondent had converted to Islam after the divorce but before the hearing of the ancillary application. For the above reasons, we cannot agree with the respondent's contention that in view of the opening words of sub-s (3) that 'The Act shall not apply to a Muslim ...', the High Court ceased to have jurisdiction over him upon his conversion to Islam. It is noted that the High Court exercised its jurisdiction in this matter under s 24(a) of the Courts of Judicature Act 1964 which states that the jurisdiction of the High Court shall include: '... jurisdiction under any written law relating to divorce and matrimonial matters ... .'

In our opinion, the words 'any written law relating to divorce and matrimonial matters' must include the Act because the High Court may derive jurisdiction in matrimonial matters under some other law, eg under s 9 of the Married Women and Children (Maintenance) Act 1950 (Rev 1981).

Secondly, the second part of s 3(3) makes reference to s 51 of the Act. It states:

> ... but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam ...

Under s 51, where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce and the court, upon dissolving the marriage, may make provision for the wife or husband and for the support, care and custody of the children of the marriage and may attach any condition to the decree of dissolution. The legislature, by enacting s 51, clearly envisaged a situation that where one party to a non-Muslim marriage converted to Islam, the other party who has not converted may petition to the High Court for divorce and seek ancillary reliefs. In another word, the conversion to Islam of one party to a non-Muslim marriage is made a ground for the other party to apply to the High Court for divorce and ancillary reliefs. Further, it would seem to us that Parliament, in enacting sub-s 51(2), must have had in mind to give a protection to non-Muslim spouses and children of the marriage against a Muslim convert. Perhaps, in its desire to accord such protection of the law, it failed to foresee a situation such as in the present reference where the parties remained non-Muslims until after the marriage was dissolved, and then one party converted to Islam. Neither the language of s 3 nor s 51 is sufficiently precise in dealing with the issue of the jurisdiction of the High Court in the circumstance. From the wording of s 51(2), the legislature clearly intended to provide ancillary reliefs for non-Muslim spouses and the children of the marriage as a result of one party's conversion to Islam. In our opinion, by implication from s 51(2) above, the High Court, in the present reference, has jurisdiction to hear and determine the ancillary issues. The implications may arise from the language used, from the context or from the application of some external rule. They are of equal force, whatever their derivation. (*Bennion's Statutory Interpretation* (2nd Ed, 1992) at p 362). It would result in grave injustice to non-Muslim spouses and children whose only remedy would be in the civil courts if the High Court no longer has jurisdiction, since the Syariah Courts do not have jurisdiction over non-Muslims. In the context of the legislative intent of s 3 and the overall purpose of the Act, the respondent's legal obligations under a non-Muslim marriage cannot surely be extinguished or avoided by his conversion to Islam.

It has been said that since the 17th century, it has been the task of the judiciary to interpret an Act 'according to the intent of them that made it': *Coke 4 Inst 330*. Indeed, this is the approach we adopt in this reference. In *Nothman v Barnet London Borough Council* [1978] 1 All ER 1243; [1978] 1 WLR 220, Lord Denning MR stated ([1978] 1 All ER 1243 at p 1246; [1978] 1 WLR 220 at p 228):

> In all cases now in the interpretation of statutes, we adopt such a construction as will 'promote the general legislative purpose underlying the provision'. It is no longer necessary for judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use

their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done, had they had the situation in mind.

In the course of the arguments, Encik Pawancheek, learned counsel for the respondent, referred us to a decision of the Kuala Lumpur High Court in *Letchumy v Ramadason* [1984] 1 MLJ 143, in support of his argument that no ancillary relief can be granted to the petitioner as she obtained her divorce on the ground of irretrievable breakdown of marriage (s 53). In *Letchumy*, the learned judge held that since the petitioner obtained her divorce on the ground of desertion, the court's power to grant maintenance must stem from the general power granted by s 77, and not under s 51(2). That being the case, any limitation to the application of the provisions of s 77 must be considered in the light of s 3(3) of the Act. According to the learned judge, s 3(3) of the Act precluded the operation of the provisions of s 77 to a Muslim and as the respondent was a Muslim, the Act could not be made to apply to him. He also held that it would have in fact been granted under s 51 on the ground of the respondent's conversion to Islam. With respect, it would appear to us that this case was decided without the benefit of a full argument on s 3 of the Act. The learned judge merely referred to the section and concluded: 'As I see it, sub-s (3) precludes the operation of the provisions of s 77 to a Muslim and as the respondent is now a Muslim, I do not think they can be made to apply to him.' Be that as it may, in the circumstances, we consider *Letchumy* was wrongly decided.

We turn next to question (1) of the reference. We would state that in the light of our reasons given on question (2) above, s 3 of the Act is not unconstitutional. We would go on to say that in so far as the Act shall not apply to Muslims (s 3(3)), this is consistent with art 11(1) of the Federal Constitution which provides that every person has the right to profess and practise his religion. On the effect of art 121(1A) of the Federal Constitution on the jurisdiction of the High Court vis-a-vis the present ancillary application, we do not propose to go into a historical survey as this constitutional question has been fully discussed by this court in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 and *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793. Suffice it to say that the new cl 1A of art 121 (amended by Act A704 of 1988) effective from 10 January 1988 has taken away the jurisdiction of the High Court in respect of matters falling within the jurisdiction of the Syariah Courts. This article provides that as from 10 January 1988, the High Courts in Malaya and Borneo shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts. The jurisdiction of the Syariah Courts is defined in the Ninth Schedule, List II — the State List of the Constitution which has jurisdiction in respect of Islamic law and personal and family law of persons professing the religion of Islam. In the present reference, s 45(3) of the Selangor Administration of Muslim Law Enactment 1952 applies because the Enactment applied to Kuala Lumpur before it became a Federal Territory. It has now been replaced by the Administration of Islamic Law (Federal Territories) Act 1993. Be that as it may, under s 45(3)(b), it is provided that the court of kathi besar or timbalan kathi besar shall in its civil

jurisdiction hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate, inter alia, to any disposition of, or claim to, property arising out of marriage or divorce, or to maintenance or division of claims to sapencharian property. It is thus clear from the above section that the Syariah Court Kuala Lumpur would not have jurisdiction over the petitioner who is a non-Muslim. It follows that art 121(1A) of the Federal Constitution does not affect the jurisdiction of the High Court to hear the application under ss 76 and 77 of the Act.

Finally, we note in passing that Encik Pawancheek, in his written submission, attempted to canvass this constitutional issue in the light of the word 'religion' in art 11(1) of the Federal Constitution. According to him, in so far as this article applies to non-Muslims, the word 'religion' is restricted to the definition of religion as propounded by judges from other jurisdictions in the cases cited by counsel. For our part, we do not consider it important to discuss these cases in view of our answer to the two questions posed in this reference. We would, nonetheless, thank counsel for his efforts in 'getting up' these authorities.

In the result, we remitted the case to the High Court below for final disposal of the ancillary application.

Order accordingly.

Reported by Prof Ahmad Ibrahim